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No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

STEVEN R. RAY, PETITIONER

v.

UNITED STATES, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

MARK R. LAND
Captain, Office of The Judge Advocate General
United States Air Force
HQ USAF/JAJD
Bldg 5683
Bolling AFB, DC 20332-6128
(202) 767-1562
Counsel of Record

RICHARD F. O'HAIR
Colonel, Office of The Judge Advocate General
United States Air Force

QUESTIONS PRESENTED

1. Whether the military judge abused his discretion when, after the government had presented its case-in-chief and rested, and after the defense presented no evidence and rested, he allowed the government to reopen its case and present evidence that the government had saved for rebuttal?

2. Whether the evidence that the government introduced after being allowed to reopen its case was erroneously admitted by the military judge in that it was more prejudicial than probative on the issues in question and should have been excluded under Military Rule of Evidence 403?

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional Provisions Involved	2
Statement of the Case	2
Reasons for Granting the Writ	3
Conclusion	9

TABLE OF AUTHORITIES

Cases:

United States v. Smith, 15 U.S.C.M.A. 416, 35 C.M.R. 388 (1965)	4
United States v. Wirth, 18 M.J. 214 (C.M.A. 1984)	4
United States v. Shaw, 9 U.S.C.M.A. 267, 26 C.M.R. 47 (1958)	4
Smith v. Conley, 548 F.2d 844 (8th Cir. 1978)	4
United States v. Ross, 7 M.J. 174 (C.M.A. 1979)	5
United States v. Cronic, 466 U.S. 648 (1984)	5
United States v. Currier, 836 F.2d 11 (1st Cir. 1987)	5
United States v. Barnes, 8 M.J. 115 (C.M.A. 1979)	8
United States v. Ray, 26 M.J. 468 (C.M.A. 1988)	*passim*

Constitutional and Statutory Provisions:

U.S. Constitutional Amendment V	2
10 U.S.C. § 867(h) (Supp III 1985)	1
28 U.S.C. § 1259(3) (Supp III 1985)	1

Rules of Evidence:

Fed.R.Evid. 611(a)	4
Fed.R.Evid. 404(b)	6
Mil.R.Evid. 401	5, 6
Mil.R.Evid. 402	5, 6
Mil.R.Evid. 403	5, 6

Miscellaneous: Page

Rules for Courts-Martial 913(c)(5) 4

S. Saltzburg, L. Schinasi and D. Schleuter, Military Rules of Evidence Manual (2d ed. 1986) 5

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v.

UNITED STATES, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

Steven R. Ray respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Military Appeals entered in his case on September 27, 1988.

OPINIONS BELOW

The decision of the United States Air Force Court of Military Review was issued on December 31, 1986. United States v. Ray, ACM 24722 (A.F.C.M.R. December 31, 1986). That decision is unreported and is reproduced in the Appendix to this Petition. The decision of the United States Court of Military Appeals is reported at 26 M.J. 20 (C.M.A. 1988), and is reproduced in the appendix.

JURISDICTION

The jurisdiction of this Court is invoked under 10 U.S.C. 867(h) (Supp III 1985) and 28 U.S.C. 1259(3) (Supp III 1985). The judgment of the Court of Military Appeals was entered on September 27, 1988.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment provides:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . .

STATEMENT OF CASE

In a fully litigated bench trial from August 13-15, 1986 at Whiteman AFB, MO, petitioner was convicted of a single specification of wrongful cocaine use. He was sentenced to a dismissal, confinement for six months and forfeitures. After the convening authority approved the sentence, the United States Air Force Court of Military Review affirmed the conviction, as did the United States Court of Military Appeals.

The evidence against the petitioner was derived from a urinalysis sample taken from petitioner in February of 1986 which tested positive for cocaine. At trial the government presented what has now become it's standard urinalysis evidence about collection procedures at the base, chain of custody, storage and testing at Brooks AFB, confirmation testing, and expert testimony concerning the scientific basis for reliability of urinalysis tests as a basis to identify drug abusers.

On cross-examination, the government's expert forensic toxicologist, Dr. Michael A. Peat, acknowledged that a positive urinalysis does not determine whether a person's use of the drug detected was wrongful or knowing. He also acknowledged that a commercially available product called "Health Inca Tea" is a source of cocaine which could result in a positive urinalysis. Finally he could not discount the possibility of the petitioner's specimen being contaminated as the sample preceding it had an extraordinarily high nanogram count.

Immediately after the government rested its case, the defense rested. Apparently not anticipating this tactic the government sought to introduce further evidence which had been withheld for possible later introduction in rebuttal, as well as evidence which would ostensibly generate the permissive inference of wrongfulness and intentional use the government needed to convict. Over an attempted defense objection the trial judge permitted the government to reopen.

The judge then considered the testimony of Colonel Gerald H. Dennis, a flight surgeon. He testified that the petitioner's medical records disclosed a number of episodes of sinusitis, a form of upper respiratory and nasal congestion from October of 1985 through May of 1986. Dr. Dennis admitted that there could be many different causes for such infections including heavy smoking, and though petitioner did not display classic signs of a chronic drug user, sinusitis symptoms were indeed consistent with chronic use of cocaine.

The government also introduced, over defense objection, testimony concerning petitioner's financial difficulties and irresponsibility as well as testimony about an incident in August of 1985 in which it appeared that the petitioner fell asleep at the controls of a helicopter. That witness also testified there were other instances where petitioner fell asleep on the job. The petitioner was found guilty as charged.

REASONS FOR GRANTING THE WRIT

I

While it is axiomatic under military law that the decision to allow either side to re-open its case-in-chief lies within the discretion of the military judge, the additional material sought to be presented during the re-opened portion must

be material, relevant and noncumulative. *United States v. Smith,* 15 U.S.C.M.A. 416, 35 C.M.R. 388 (1965). This issue is clearly worthy of certiorari as the record is devoid of evidence justifying the trial judge's decision to allow the prosecution to re-open.

R.C.M. 913(c)(5), Manual for Courts-Martial, states "The military judge may, as a matter of discretion, permit a party to re-open its case after it has rested." It is noteworthy that the trial judge recognized the government's new evidence could not properly be characterized as or admitted in rebuttal since no defense evidence was presented. *United States v. Wirth,* 18 M.J. 214, 218 (C.M.A. 1984); *United States v. Shaw,* 9 U.S.C.M.A. 267, 271, 26 C.M.R. 47, 51 (1958). Moreover, trial counsel offered no justification for the need to re-open the case other than having additional evidence to present. This evidence clearly could have been offered in the prosecution's case-in-chief. Under somewhat analogous circumstances the Eighth Circuit Court of Appeals upheld the ruling of a trial judge under Fed. R. Evid. 611(a) excluding the testimony of plaintiff's expert witness after the defense rested because the witness had been available during the plaintiff's case-in-chief. *Smith v. Conley,* 584 F.2d 844 (8th Cir. 1978).

At bar, the Court of Military Appeals intimated the trial judge did not abuse his discretion because there was a defense motion which had not yet been ruled on. Yet the court's opinion in no way *limits* the ability of the government to re-open its case-in-chief to this factual situation. By granting certiorari in this case, this Court would have an opportunity to establish parameters of when a military judge could properly allow the government to re-open its case once it has closed. This is particularly important because of the serious responsibility the military judge carries in making sure an accused receives a fair trial. The Court of Military Appeals has said that a judge must "take

steps to insure a constitutional or codal shield for the criminal accused is not improperly transformed into a prosecutorial tool by the government." *United States v. Ross,* 7 M.J. 174,176 (C.M.A. 1979). Allowing the prosecution to re-open its case without stronger guidance than what the Court of Military Appeals provided at bar acquiesces to the very evil the court sought to discourage in *Ross.* The ramifications from this lack of guidance go beyond the potential inhibition of legitimate defense trial tactics. The external constraints on defense counsel's performance resulting from the judge's ruling denied the petitioner at bar effective assistance of counsel because the tactical "game plan" by which his trial defense counsel sought to represent petitioner became totally ineffectual. *See, United States v. Cronic,* 466 U.S. 648, 661-662 (1984) (external constraints on defense counsel's performance may violate the right to effective assistance of counsel upon a showing of prejudice.)

II

The trial judge's error in allowing the prosecution to reopen it's case is exacerbated by the fact the evidence admitted does not satisfy even the most liberal construction of relevance tests. The admitted evidence typifies the prejudice resulting to the petitioner from the trial judge's actions and underscores the need for certiorari.

The threshold predicate for admissibility of evidence in a court-martial is that the evidence must be relevant to the case. Mil. R. Evid. 401. Evidence which is not relevant is not admissible. Mil. R. Evid. 402. Under the rubric of legal relevance, there is an additional prerequisite to admissibility. The item's probative value must outweigh any attendant prejudicial dangers. S. Saltzburg, L. Schinasi and D. Schleuter, *Military Rules of Evidence Manual,* 335-336 (1986); Mil. R. Evid. 403.

Even assuming the evidence admitted during the reopened portion of the government's case might somehow be deemed relevant (a point we do *not* concede), we contend the evidence should have been excluded because its probative value, if any, was substantially outweighed by its unfair prejudicial impact. Mil. R. Evid. 403. Further, that trial defense counsel's objection was under Mil. R. Evid. 401 and 402 does not, as the Court of Military Appeals intimates, waive consideration of the evidence on appeal under Mil. R. Evid. 403. In *United States v. Currier,* 836 F.2d 11, 16 (1st Cir. 1987), the court held that failure to make a specific objection under Fed. R. Evid. 404(b) did not foreclose consideration of the admitted evidence in that light when appellant objected under Fed. R. Evid. 403 at trial. The court held the two rules usually go hand in glove. This is equally applicable to the instant case as the rules in question all relate to relevance.

Dr. Dennis' testimony concerning petitioner's sinusitis is irrelevant for several reasons. The symptomology could only be consistent with chronic, not moderate or experimental cocaine use; yet appellant had none of the classic signs of such use. There was nothing based on the examination of the petitioner which would lead Dr. Dennis to believe the sinusitis was caused by cocaine. Further, the fact that petitioner is a heavy smoker could also account for this ailment. Finally, the fact that petitioner was afflicted with this problem from seven months before the alleged offense up to three months afterwards has no tendency to make the existence of any fact of consequence to the trial more or less probable than would be the case without this evidence. Mil. R. Evid. 401. The fact that petitioner suffered from upper respiratory congestion in a manner which was inconsistent with, in this case, even chronic use of cocaine, has no tendency to prove that he knowingly or wrongfully used cocaine on an occasion in

February of 1986. With the absence of *any* causal nexus between petitioner's sinus condition and cocaine use, this evidence fails to pass muster under Mil. R. Evid. 401 standards.

Of greater significance however, was the prejudice attendant this testimony. The prejudice inherent in the fallacious and illogical assumption that merely because one suffers from sinusitis that person must use cocaine counterbalances any probative value in this evidence. Mil. R. Evid. 403. This conclusion is buttressed when one considers that the ostensible reason for admitting this evidence was to supply government proof on the theretofore omitted element of knowing and wrongful use. Absent evidence that appellant had inhaled cocaine as the method of ingestion (there is no such evidence in the record) or even that inhaling was a common or preferred method of use, there became virtually no probative value to the fact that appellant had a historical sinus condition. Moreover, the existence of that condition improperly invited the trial judge to infer knowing and wrongful use of cocaine where there was no factual predicate in the record for such an inference. Under these circumstances, the prejudice to appellant by the judge's admission and consideration of this evidence is manifest.

The error in admitting evidenee of appellant's financial difficulties similarly derives from a nonsequiter in logic. Many individuals have financial difficulties for reasons wholly unrelated to the expenditure of funds for the purchase of illicit substances. The judge's articulated rationale for considering this evidence is unsupported by any evidence in the record and is not such a matter of common knowledge or ready verification that *sub silentio* judicial notice was appropriate. There was literally no testimony about the cost of cocaine which would justify the trial judge's fundamental premise in admitting this evidence.

While the admitted testimony might have been germane to, and probative of, a charge of purchase or sale, such value disappears where the disputed issue is the circumstances surrounding the use of an illicit substance. That the judge, as the trier of fact in this case, would conclude that appellant wrongfully used cocaine based upon pre-existing financial difficulties that were never shown to be affiliated with illegal drugs of any kind highlights the undue prejudice in the admission of this testimony.

Consideration of testimony of petitioner's soporific piloting performance was error for essentially the same fundamental reasons of irrelevance and lack of probative value. Initially, we note that the testimony did not establish that appellant fell asleep while flying. He had on a dark visor, and the witness could not tell if he were sleeping. The incident occurred in August 1985. It is anomalous to suggest, as the trial judge apparently reasoned, that the use of cocaine, a stimulant, would be more likely to have occurred in February 1986, because appellant became drowsy at work in August 1985, or at any other time. There was no legal relevance or probativeness to this evidence, only unmitigated prejudice.

The Court of Military Appeals announced the standard for assessing nonconstitutional error in *United States v. Barnes,* 8 M.J. 115 at 116 (C.M.A. 1979);

> An error not of Constitutional proportion may be found harmless if it can be determined that the fact-finder was not influenced by it or the error was minimus on the resolution of the issue.

Even under this liberal standard, admission of the evidence decried above was by no means harmless. This improperly admitted evidence served as the basis for the trial judge to draw an inference of knowing and conscious use of cocaine, when the disputed evidence in no way tended to support such an inference.

CONCLUSION

The prejudice resulting to the petitioner from the trial judge's allowing the government to re-open its case after the defense had rested is clear. At the very least there was insufficient cause to characterize this decision as anything but an abuse of discretion. More importantly however, the judge was improperly influenced by the irrelevant evidence submitted by the prosecution. The cumulative effect of allowing the government to re-open its case and consideration of highly irrelevant and prejudicial evidence constitutes a denial of the petitioner's due process rights. Thus, the petitioner asserts the Court of Military Appeals' conclusion that relief is not warranted is erroneous, and the case warrants further examination by this Court. For these reasons, the petition for a writ of certiorari should be granted.

MARK R. LAND
Captain, Office of The Judge Advocate General
United States Air Force
HQ USAF/JAJD
Bldg 5683
Bolling AFB, DC 20332-6128
(202) 767-1562
Counsel of Record

RICHARD F. O'HAIR
Colonel, Office of The Judge Advocate General
United States Air Force

APPENDICES

APPENDIX A

U.S. Court of Military Appeals

No. 57,347
ACM 25569

UNITED STATES, APPELLEE

v.

STEVEN R. RAY, CAPTAIN, U.S. AIR FORCE, APPELLANT

Sept. 27, 1988

Accused, a captain in the United States Air Force, was convicted by general court-martial, Jack H. Morgan, J., of wrongful use of cocaine. The United States Air Force Court of Military Review affirmed. Review was granted. The United States Court of Military Appeals, Sullivan, J., held that: (1) military judge did not abuse his discretion when, after Government had presented case in chief and rested, and after defense presented no evidence and rested, he allowed Government to reopen case and present evidence that Government had saved for rebuttal, and (2) some evidence which Government introduced after being allowed to reopen case was admissible.

Affirmed.

Everett, C.J., filed an opinion concurring in the result.

1. Military Justice No. 1247

Military judge did not abuse his discretion when, after Government had presented case in chief on charge of wrongful use of cocaine and rested, and after defense presented no evidence and rested, he allowed Government to reopen case and present evidence that Government had saved for rebuttal; although Government had rested case, judge had not yet ruled on earlier defense motion to dismiss because of failure to show wrongfulness, Government offered challenged evidence to show circumstantially that accused's use of cocaine was wrongful, and question existed as to sufficiency of evidence of urinalysis test results to show element of wrongfulness required in drug cases. R.C.M. 913(c)(5); MCM 1969, par. 71, subd. *a.*; UCMJ, Art. 112a, 10 U.S.C.A. § 912a.

2. Military Justice No. 787

Evidence of accused's sinus condition was relevant and admissible in court-martial for wrongful use of cocaine; foundation was laid establishing that medical or physical condition was consistent with regular use of cocaine, rational inference could be drawn from regular drug use that conduct on particular occasion was knowing or intentional, and in view of equivocal and limited nature of doctor's testimony, testimony did not unduly suggest that people with sinus problems necessarily commit cocaine offenses. Military Rules of Evid., Rules 403, 406.

3. Military Justice No. 1027, 1247

Evidence of accused's financial problems and inability to pay debts was relevant and admissible in court-martial for wrongful use of cocaine; military judge considered evidence in view of well-accepted fact that drugs, such as

cocaine, cost money, and judge stated he would not consider the evidence as showing that accused committed offense because he was a bad man. Military Rules of Evid., Rules 104(a), 401-403, 404(b), 406.

4. Military Justice No. 787, 1425

Testimonial evidence of accused's drowsiness was not relevant to court-martial for wrongful cocaine use in the absence of medical basis or foundation showing that falling asleep or nodding off has any relation to wrongful and knowing use of cocaine; however, evidence was substantially cumulative of earlier testimony concerning accused's falling asleep which was not objected to by defense, and thus, error was harmless.

For Appellant: *Captain Henry J. Schweiter* (argued); *Colonel Leo L. Sergi* (on brief).

For Appellee: *Captain Jeffrey H. Curtis* (argued); *Colonel Joe R. Lamport* and *Lieutenant Colonel Robert E. Giovagnoni* (on brief).

OPINION OF THE COURT

SULLIVAN, Judge:

During August 1986, appellant was tried by general court-martial, composed of a military judge sitting alone, at Whiteman Air Force Base, Missouri. Contrary to his pleas, he was found guilty of wrongful use of cocaine, in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. Appellant was sentenced to dismissal, confinement for 6 months, and forfeiture of $500 pay per month for 6 months. The convening authority approved the sentence. The Court of Military Review affirmed in a short-form opinion.

This Court granted review of the following issues specified by the Court:

I

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN, AFTER THE GOVERNMENT HAD PRESENTED ITS CASE-IN-CHIEF AND RESTED, AND AFTER THE DEFENSE PRESENTED NO EVIDENCE AND RESTED, HE ALLOWED THE GOVERNMENT TO REOPEN ITS CASE AND PRESENT EVIDENCE THAT THE GOVERNMENT HAD SAVED FOR REBUTTAL.

II

WHETHER THE EVIDENCE THAT THE GOVERNMENT INTRODUCED AFTER BEING ALLOWED TO REOPEN ITS CASE WAS ERRONEOUSLY ADMITTED BY THE MILITARY JUDGE IN THAT IT WAS MORE PREJUDICIAL THAN PROBATIVE ON THE ISSUES IN QUESTION AND SHOULD HAVE BEEN EXCLUDED UNDER MILITARY RULE OF EVIDENCE 403.

We hold that, in view of the circumstances at this trial, the military judge did not abuse his discretion when he allowed the Government to reopen its case. R.C.M. 913(c)(5), Manual for Courts-Martial, United States, 1984. Additionally, we hold that, although some of the evidence introduced after the Government reopened its case was erroneously admitted, its admission was harmless error. Art. 59(a), UCMJ, 10 U.S.C. § 859(a).

Appellant was charged with wrongful use of cocaine under Article 112a. The Government based its case on evidence of a positive urinalysis of a urine specimen purportedly submitted by appellant on February 3, 1986. At trial, government witnesses testified that the urinalysis was properly conducted and the procedures for collection, chain of custody, storage and testing, and confirmation testing were correctly followed. In addition, the Govern-

ment provided expert testimony concerning the scientific basis for urinalysis testing and its reliability in identifying the presence of contraband drugs.

On cross-examination, the government expert, Dr. Michael Peat, admitted that urinalysis cannot detect the wrongful or knowing use of cocaine. He further testified that in the sample tested just prior to appellant's, there was a high concentration of cocaine and that there was a possibility that appellant's sample could have been contaminated by the residue from the prior sample. He also stated that the herbal tea called "Health Inca Tea" is a source of cocaine which could lead to a positive urinalysis. The government expert nevertheless discounted the possibility of a false positive cocaine reading in appellant's urinalysis for several reasons. First, he stated that appellant's urine sample was tested twice, as a precaution against any possible contamination, and the second reading was also positive for cocaine. He also testified that the Health Inca Tea, though not known to be sold in the vicinity of Whiteman AFB, was banned by the Food and Drug Administration several months before trial and all stores had been ordered to remove it from their shelves.

Following redirect examination of its expert witness, the Government rested. Immediately thereafter, the defense rested its case without submitting any evidence. A colloquy ensued as to whether the Government could present additional evidence regarding the Health Inca Tea,[1] as well as evidence regarding the element of wrongfulness. The Government referred to this evidence as "rebuttal"; however, the military judge characterized it as reopening the Government's case. Over defense objection, the military judge allowed the Government to reopen its case and present the evidence.

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[1] The military judge found this evidence was inadmissible on "hearsay" grounds.

The Government called three witnesses. The first was the base flight surgeon, Colonel Gerald Dennis. Defense counsel objected to the Government's questions as to whether appellant had sinusitis (a condition involving inflammation of the nasal mucous membranes) and whether cocaine use would be consistent with appellant's symptoms. The military judge overruled both relevance objections. Colonel Dennis testified that appellant's medical record demonstrated his symptoms of sinusitis and upper respiratory infection for over 9 months prior to trial. In addition, Colonel Dennis stated that there are various factors, such as appelant's heavy smoking, which could cause the symptoms which appellant demonstrated. However, on re-direct, Colonel Dennis acknowledged that the symptoms suffered by appellant could also be the result of regular cocaine use.

The second witness was the operations officer of appellant's squadron, Major Harry Whitaker. He was questioned concerning appellant's financial problems. Defense counsel again objected on the ground of relevance. The military judge overruled the objection, stating: "I don't need to hear the argument, counsel, the objection is overruled. I see relevance to this question." Major Whitaker testified that on two occasions appellant had problems in repayment of loans; that he was counseled on the matter and received a letter of reprimand for his financial affairs; and that appellant had resolved the problems. Finally, Major Whitaker stated that appellant had fallen asleep during pilot's meetings on occasion. After direct testimony, the military judge commented:

> Just to clarify the ruling that I made, I felt the information concerning financial problems was relevant in that it is a well accepted fact that drugs, such as cocaine, do cost money and there is some relevance to

> the financial status of an individual who is accused of using drugs and that could affect his financial ability to meet other obligations. In that degree, I felt it was relevant. I certainly will not consider it in any manner to show the accused is a bad person or as other misconduct. I will limit it to that very specific use for what it may be worth.

The third witness was the training officer for appellant's squadron, Captain William Bassett. He testified that during a TDY helicopter trip in August 1985, appellant appeared to be "falling asleep at the controls" of the helicopter. The defense interposed a relevance objection, which was overruled without comment.

I

[1] The first question for review is whether the judge properly permitted the Government to reopen its case after the defense rested. *See generally United States v. Smith,* 15 U.S.C.M.A. 416, 417, 35 C.M.R. 388, 389 (1965); *United States v. Kennedy,* 8 U.S.C.M.A. 251, 24 C.M.R. 61 (1957). The President in addressing this procedural matter has stated in R.C.M. 913(c)(5), "The military judge may, as a matter of discretion, permit a party to reopen its case after it has rested." This flexible standard originated in earlier Manual provisions which sought, *inter alia,* to avoid the granting of motions for finding of not guilty where available evidence had not been presented by the prosecution. Drafter's Analysis, Manual, *supra* at A 21-55. *See* para. 71*a,* Manual for Courts-Martial, United States, 1969 (Revised edition).

This procedural rule implies that the moving party should proffer some reasonable excuse for its request to reopen its case. *See United States v. Kennedy, supra* at 253, 24 C.M.R. at 63. *See also United States v. Kelm,* 827

F. 2d 1319, 1323 (9th Cir.1987); *United States v. Blankenship,* 775 F. 2d 735, 740-41 (6th Cir.1985); *United States v. Walker,* 772 F. 2d 1172, 1183-84 (5th Cir.1985). One reason proffered by trial counsel at this court-martial was that, although he had rested his case, the judge had not yet ruled on an earlier defense motion to dismiss because of a failure to show wrongfulness. The Government offered the challenged evidence to show circumstantially that appellant's use of cocaine was wrongful, assuming proof of the test results themselves was not sufficient for this purpose.[2]

This case was tried in August 1986, approximately 1 month after the decision of this Court in *United States v. Harper,* 22 M.J. 157 (C.M.A.1986). Defense counsel's motion to dismiss and trial counsel's belated response reflect some confusion as to the import of this decision. In particular, a question existed as to the sufficiency of evidence of urinalysis test results by themselves to show the element of wrongfulnss required in drug cases. *See United States v. Ford,* 23 M.J. 331 (C.M.A.1987); *United States v. Murphy,* 23 M.J. 310 (C.M.A.1987). In addition, the challenged evidence was available to the prosecution earlier in the trial, and trial counsel implied that it was withheld for use on the unresolved defense motion. *Cf.* R.C.M. 917. These were reasons enough for the judge to allow the prosecution to reopen its case to adduce additional proof on this element of the offense. *See United States v. Blankenship, supra* 775 F.2d at 741. Moreover, in view of the defense's failure to present evidence before or after the reopening of the Government's case, we would be hard pressed indeed to find any prejudice stemming from the challenged order of proof. *See United States v. Faul,* 748 F.2d 1204, 1218 (8th Cir.1984), *cert. denied,* 472 U.S. 1027, 105 S.Ct. 3500, 87 L.Ed.2d 632 (1985).

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[2] *See* appendix.

II

The second granted issue questions admissibility of the government evidence introduced after the prosecution was permitted to reopen its case. Appellant's claim on appeal is that such evidence was more prejudicial than probative and, therefore, its admission was barred under Mil.R. Evid. 403, 1984 Manual, *supra.*

We first note that this particular objection was not made at appellant's court-martial. He asserted there that this evidence was irrelevant, a matter covered by Mil.R. Evid. 401 and 402. *See United States v. Dorsey,* 16 M.J. 1, 5-6 (C.M.A.1983). *Cf. United States v. Mukes,* 18 M.J. 358 (C.M.A.1984). Accordingly, a finding of waiver of the particular issue under Mil.R.Evid. 403 would not be unjustified. *See* Mil.R.Evid. 103(a)(1). We also note that an objection based on Mil.R.Evid. 403 is premised on relevant evidence being unduly prejudicial. *See United States v. Abel,* 469 U.S. 45, 55, 105 S.Ct. 465, 470-471, 83 L.Ed.2d 450 (1984). This was a trial before judge alone and, assuming the evidence was admissible for a proper purpose, we are normally confident that the judge will limit his consideration to that end. *See generally United States v. Kinman,* 25 M.J. 99, 101 (C.M.A.1987).

[2] In any event, appellant's contentions on this appeal, *i.e.,* that this evident was irrelevant or, if relevant, unfairly prejudicial, are also flawed. The defense asserts that evidence of appellant's sinus condition had no probative value on the question of whether he knowingly and wrongfully used cocaine as charged. We disagree. A foundation was laid establishing that such a medical or physical condition was consistent with regular use of cocaine. Moreover, a rational inference can be drawn from regular drug use (*see* Mil.R.Evid. 406) that conduct on a particular occasion was knowing or intentional. *See United States*

v. Harper, supra at 163. Finally, in view of the equivocal and limited nature of this doctor's testimony, we are not convinced that it unduly suggested that people with sinus problems necessarily commit cocaine offenses. *See United States v. Mukes, supra.*

[3] The evidence of financial problems and inability to pay debts was arguably less relevant than the medical evidence noted above. The military judge considered this evidence in view of "a well accepted fact that drugs, such as cocaine, do cost money . . ." *See* Mil.R.Evid. 104(a). Again, the implied premise behind the proffer of this evidence is that a pattern of regular drug use can show a knowing drug use on a particular occasion. *United States v. Harper, supra. See* Mil.R.Evid. 404(b) and 406. The particular relevance of the debt evidence was that regular drug use requiring continual expenditure of cash can be shown circumstantially by an inability to pay other debts. While this evidentiary theory is extremely weak (*see* 2 Wigmore, Evidence § 224 (Chadbourn rev. 1979)), it is not irrational and is conceivably admissible under Mil.R.Evid. 401 and 402. *Cf. United States v. Hernandez,* 588 F. 2d 346, 348-49 (2d Cir.1978). More importantly, however, there was no possibility of a Mil.R.Evid. 403 violation here because the judge expressly said he would consider this evidence only for this purpose, and he would not consider it as showing appellant did the charged offenses because he was a bad man. *Id.*

[4] The evidence of drowsiness from Captain Bassett was simply now shown to be relevant by the prosecution. No medical basis or foundation was established showing that falling asleep or nodding off had any relation to the wrongful and knowing use of cocaine. However, this evidence was substantially cumulative of earlier testimony concerning appellant's falling asleep from Major Whitaker, which was not objected to by the defense.

In conclusion, the Government presented a solid case of appellant's guilt of the charge. The defense presented no case of its own, relying instead on perceived weaknesses in the Government's case. The additional prosecution evidence, in large party, had some bearing on the Government's purported failure to sufficiently show appellant's use of cocaine was wrongful. Mil.R.Evid. 401 and 402. This evidence, however, was not required for a conviction and paled in importance compared to the scientific evidence of urinalysis earlier presented in this case. Moreover, any undue prejudice which might have flowed from this testimony was either cured or waived. In these circumstances, relief is not warranted. Art. 59(a). *See United States v. Brooks,* 26 M.J. 28, 29 (C.M.A.1988); *United States v. Mann,* 26 M.J. 1, 5 (C.M.A.1988).

The decision of the United States Air Force Court of Military Review is affirmed.

Judge COX concurs.

APPENDIX

TC: Well, sir, we have some rebuttal evidence about this Health Inca Tea that we would like to present. We also have some other evidence which may not—the court may not need, but we, for sure, have a witness about Health Inca Tea.

MJ: Well, although it's kind of hard to see how you can rebut this defense which has not been presented; technically, the defense did bring information out on cross-examination, and what I'll allow the Government to do is reopen its case, and, of course, give the defense another opportunity to present evidence, if it wishes. *I don't really consider it to be rebuttal of defense, but certainly it's rebuttal of information which came out on cross-examination, and*

I'm going to allow the Government to reopen at this point if you want to call a witness on that issue.

TC: *Yes, sir, and while we are here, I suppose we should mention that you haven't made a ruling on wrongfulness and we have a wealth of information, circumstantial-type information, to corroborate the tests.* If you need some more evidence—you said that you weren't willing at this time—and, of course, we've rested, and—

MJ: Well, there has been evidence before the court that the specific test used could in no way, of course, show wrongfulness or intentional use.

TC: Right.

MJ: *This was brought out in cross-examination. If the Government wishes to pursue evidence which would tend to go to wrongfulness, certainly, with or without that, I would have allowed it.* It is certainly an issue now, in any case, because it has come up in testimony of the expert witness that this test, itself, cannot detect that; however, there is an inference which can be drawn, and I cannot tell you now whether I would draw it or not, but certainly it's one that the court might be willing to draw if all the evidence is sufficient. However, that does not preclude the Government, in any case, from going forward if the Government has any evidence of wrongfulness which, of course, is one of the elements. So, if you wish to introduce evidence on that issue, I will allow you to. I'm not going to be able to tell you whether you have to or not.

(Emphasis added.)

EVERETT, Chief Judge (concurring in the result):

I agree that, in his discretion, the military judge could allow the Government to reopen its case. However, this

certainly is not a practice that should be encouraged, because it tends to reward poor trial preparation by the prosecution.

In my view, the evidence of financial problems and drowsiness was irrelevant; and the evidence as to appellant's sinus condition was of very limited relevance. Moreover, I believe that the defense objection on relevance grounds, *see* Mil.R.Evid. 402, was sufficient to include an objection that, if the evidence offered by the Government had any probative value, this was outweighed by its prejudicial effect, *see* Mil.R.Evid. 403.

The evidence as to the financial problems and drowsiness not only invited speculation by the factfinder but also suggested misconduct on appellant's part—dishonorable failure to pay debts and dereliction of duty. I reluctantly concur in the result only because I conclude that, in this trial by military judge alone, admission of the contested evidence did not change the outcome.

APPENDIX B

UNITED STATES AIR FORCE
COURT OF MILITARY REVIEW

ACM 25569

UNITED STATES

v.

CAPTAIN STEVEN R. RAY, 337-44-1456 FR
UNITED STATES AIR FORCE

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31 Dec. 1986

Sentence adjudged 15 August 1986 by GCM convened at Whiteman Air Force Base, Missouri. Military Judge: Jack H. Morgan (sitting alone).

Approved sentence: Dismissal, confinement for six (6) months and forfeiture of five hundred dollars ($500.00) per month for six (6) months.

Appellate Counsel for the Appellant: Colonel Leo L. Sergi and Captain Henry J. Schweiter. Appellate Counsel for the United States: Colonel Joe R. Lamport, Lieutenant Colonel Robert E. Giovagnoni, Major Joseph S. Kistler and Captain Robert L. Marconi, USAFR.

Before

SESSOMS, STEWART and LEWIS
Appellate Military Judges

DECISION

PER CURIAM:

We have examined the record of trial, the assignment of errors, and the government's reply thereto and have concluded that the findings and sentence are correct in law and fact and that no error prejudicial to the substantial rights of the accused was committed. Accordingly, the findings of guilty and sentence are

AFFIRMED.

[SEAL]

OFFICIAL:

/s/ CAROLE V. PETTI

Carole V. Petti
Clerk of Court
Court of Military Review

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